DOCUMENT RESUME

ED 140 511 95 EA 009 835

TITLE	Options in Education. Program #85: The Courts and the Public Schools.
INSTITUTION	George Washington Univ., Washington, D.C. Inst. for Educational Leadership.; National Public Radio, Washington, D.C.
SPONS AGENCY	Carnegie Corp. of New York, N.Y.; Corporation for Public Broadcasting, New York, N.Y.; National Inst. of Education (DHEW), Washington, D.C.
PUB DATE	11 Jul 77
NOTE	24p.
EDRS PRICE	MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS	Constitutional Law; Due Process; *Educational Finance; Elementary Secondary Education; *Freedom of Speech; *School Integration; *School Law; Student Publications; *Student Rights; *Supreme Court Litigation

ABSTRACT

This publication is the complete transcript of a weekly radio program devoted to contemporary issues in American Education. This particular program focuses on the topic of the courts and their relationship to the public schools. Separate segments of the program discuss 1) a recent suit by a high school graduate who can't read and cases involving the use of local property taxes to finance schools, 2) the role of the courts in school desegregation, 3) the First Amendment as the courts have applied it to censorship of student publications, 4) student rights and the requirements governing due process in disciplinary cases, and 5) current trends in Supreme Court decisions involving schools and students. (JG)

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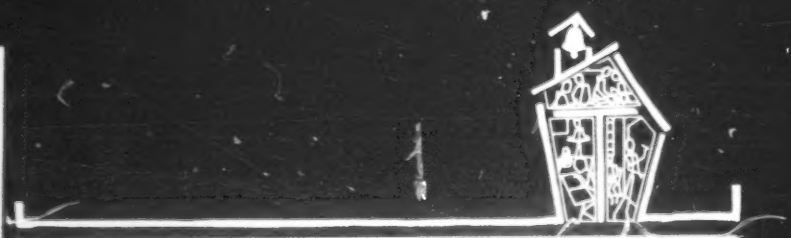
OPTIONS IN EDUCATION

PROGRAM TRANSCRIPTS OF
A WEEKLY SERIES BROADCAST BY
MEMBER STATIONS OF
NATIONAL PUBLIC RADIO

EA 009 835



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Program #85 The Courts and the Public Schools

July 11, 1977

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THE COURTS AND THE PUBLIC SCHOOLS

MERROW: From National Public Radio in Washington, this is OPTIONS IN EDUCATION, with a special program on "The Courts and The Public Schools".

Essentially, we have two questions: How are court decisions influencing what goes on in the schools, and, are the courts too involved? Have judges become school administrators?

I'm John Merrow. Wendy Blair is off this week, and with me in the Studio are Robert Krulwich and Nina Totenberg. Robert Krulwich is a lawyer and a news editor at National Public Radio. Nina Totenberg, NPR's legal affairs correspondent, covers the activities of the Supreme Court. Robert and Nina will be reporting and commenting throughout the program.

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KRULWICH: It's often said that we live in an age of litigation, and those who say that are likely to point to the schools as evidence. There are at least five areas where the courts have been asked to intervene -- desegregration, discipline, free speech, money, and "educational malpractice."

TOTENBERG: Malpractice is the flashiest of the issues. It's a consumer protection question, based on the premise that schools have a responsibility to educate. And if they fail to educate, then they ought to be held liable.

MERROW: Cathy Lewis has a report on three educational malpractice lawsuits.

LEWIS: Edward Donahue is a 19-year old high school graduate who can't read. He graduated from Copake Senior High School on Long Island in June 1976. In February 1977, Edward Donahue and his parents filed suit in Suffolk County Court against the Copake Union Free Schools. Their charge: Educational Malpractice. They claimed that Edward should have been left back, that it was the obligation of the school to teach him varied subjects including how to read.

School records show that Edward failed English in his Sophomore and Junior years, but was still promoted. The Donahues say that the school pushed him through, failed to psychologically test him for possible learning disabilities, and neglected to advise him of the extent of Edward's difficulties. Edward Donahue still reads at the elementary school level. And for a 19-year old boy, this can be a serious social as well as economic handicap.

DONAHUE : Life is limited in what you do. You can only do so many things, because the rest of the stuff takes a little more education, a little more reading, a feeling...you can't look for a job in the paper, because you can't read the Want Ads. Times when people read a joke and they hand the joke to me and I would just sort of have to give a fake laugh, like I read it, because I don't want to tell them that I couldn't read. Right now, when I go to file suits, people still laugh, you know. They say "You can't read". And I say "Well, yeah I can't", I wouldn't be doing it for no other reason. Some people think it's a joke, and that you can make it by without

an education, but, it's really hard, I couldn't do it, I think it's impossible.

LEWIS: The Copake Union School District filed a motion in May of this year to dismiss the Donahue case. School officials contend that Donahue's claim was filed too late. That the school's alleged legal obligation terminated in June 1976 when Edward graduated. While the school board doesn't deny that Edward Donahue was granted a diploma and can't read, the defendants say that there is no legal case.

Edward Donahue's situation is not unique. A similar case was filed in 1972 against the San Francisco Unified School District by 18-year old Peter Doe. He sued for fraud because he was still reading at the fifth-grade level after graduating from High School. Doe sued for five hundred thousand dollars claiming a loss of earning capacity by his limited ability to read and write. In 1974, the Superior Court of California ruled against him. The Court of Appeals later upheld that decision, saying that State Law did not cover his claim, even if he was mentally incapacitated. California Supreme Court finally dismissed the case in September 1976, saying that the school board could not be held responsible for a student's inability to read.

Sidney Sybon is the attorney for the Donahues in New York. He says that while the facts of the two cases are similar, there are differences in the state laws.

SYBON: The law in the state of New York is not the same as that in California. We have tried a two-fold offense here. We are suing on the theory that the school board was negligent. We also claim a contractual obligation. We say that Mrs. Donahue and her husband, the parents of this young Edward, pay taxes, and they are charged a certain sum of money each year,quite substantial, for the education of their children. They say that when they paid taxes there was an implied promise on the part of the School Board that that school board would educate their son. This was not done.

LEWIS: Another case is pending in Fort Lauderdale, Florida. The parents of 19-year old Elizabeth Garett are suing the Broward County Schools to block her graduation. They say that Elizabeth hasn't learned enough to graduate. And the school maintains that she has fulfilled all the requirements. Florida law allows a public school system to contract with a private school if the public schools don't fulfill the needs of the child. The Garetts requested that the public schools pay for a private institution but were turned down.

The greatest controversy in each of these educational malpractice suits is over the question of remedy. What can be substituted for a lack of education?

The Garetts, in Florida, are suing for unspecified compensatory damages. In San Francisco, Peter Doe sued for 500,000 dollars claiming a loss of earning capacity. In New York,Edward Donahue claims the same loss and is asking for five million dollars. Sybon, Donahue's attorney, explains how they arrived at a figure of five million dollars.

SYBON: A boy 18 years of age goes out into the world to compete with boys and girls of the same age, but who hasn't got the tools. Now what are the tools? When he graduated, in June of 1976, he could not read pass the fourth grade. He went to get a job in the industry, he couldn't fill out the application, he couldn't read it. Now at age 18, if he

couldn't read and couldn't get a job, other than a ditch-digger or something, we feel that his future has been ruined. And therefore, if his life expectancy would be the normal age 70, he would have had fifty-two years during which he would have suffered because of the school board's fault. And that's why we arrived at the figure of five million.

LEWIS: But do you think that payment for a lack of education is correct?

SYBON: It can never substitute for their personal injuries and the permanency of the damage, but at least, it is some financial remuneration. Our law is based on a...if somebody hurts you, he should be made responsible...at least civily, it is unfair. This has been thrown up to me. If I was successful in this law suit and I received on behalf of my client a sum total of money, it would be taken away from the other students who needed that in payment of teachers and personnel. That is true, and it's something that I've thought over before I started the action.

However, this is the only way we can bring to the public's attention...

LEWIS: The Donahues feel that they have no alternative except to sue the school district. Edward should have had special classes from the start, they say, but now it is too late and impractical for him to be put back to the fifth grade. Edward and his mother insist, however, that they don't care about the money.

MRS. DONAHUE: We're actually not interested in the money. We are interested in bringing this to the awareness of the public. There are so many children in America that need help and are not receiving it.

EDWARD: People say,"You know, you're going to get five million dollars" If it was up to me, I'd rather live my life over and have an education, and write and read on my own. It's hard to do things that five million dollars is not really worth it to me.

LEWIS: Yeah, but if you had it, you wouldn't even have to worry about getting a job.

EDWARD: With the money, it wouldn't take as long in educating. Because I can school and then I wouldn't have to work and go to school, like I do now. It's hard, but I wish some of the teachers would have kept me back and helped me.

LEWIS: It is the burden of the State to assure that every child receives and education appropriate to his needs. And each of those charging educational malpractice, feel that the school district must be held accountable for failure to provide adequate education.

In all three cases, the plaintifs requested damages from the school. No one asked the Courts to order the school boards to re-educate the illiterate students. According to Burke Delventhal, the City Attorney who represented the San Francisco School Board, the court in California said that a ruling for the student would have had serious consequences for educators. The High Court dismissed the case because they said: "Little is known about education and the influence other factors outside the classroom might have on the student. Therefore, the Court should not get involved in the educational process."

In New York, court action is still pending.

MERROW: That report was prepared for OPTIONS IN EDUCATION by Cathy Lewis, in New York. With me now in the studio, are NPR's Robert Krulwich and Nina Totenberg, both well versed in the law. I'm curious to know what you think of that remedy: five million dollars.

KRULWICH: Well, I think it's a nice..nice if you can get it! But it strikes me as a more logical thing to ask for is some kind of re-education. If the remedy, the logical remedy here would be " Make me whole, make me like the regular graduate from a high school, give me what I couldn't get". And the problem with that for a judge, I would think, is the problem that Cathy mentioned in her report.

It is a little hard (a) for the judge to decide for certain that the blame belongs completely on the school system. For all we know, any of these plaintifs might have gone home to a house where there were no lights, where the parents wouldn't give them any time to study, where there was a pressure in the household not to do whatever the teacher expected the kids to do.

MERROW: But I think you could find instances of negligence. If a kid tested-out at a third-grade level, was in the fifth grade and the next year promoted to the sixth year and then to the seventh year, but continued to test so poorly, and if you could demonstrate that the school hadn't intervened in some way, or had attempted to intervene, then certainly there would be a case to be made for negligence.

KRULWICH: Yes. If I were the judge, if I wanted to fix blame, and I guess I would, I wouldn't have too much difficulty fixing it on the School Board. The question is what do I do next. The judge here is in a difficult problem, a difficult situation. If he says to somebody, the school board: "Educate him right," then he has to sort of sit, in waiting, to see whether they do the job properly. He also has to make himself into an expert of what is the proper job to be done.

That's a fairly subtle business. Because...

TOTENBERG: Couldn't the judge, let's say, couldn't there be an interim way of doing it? For example, the judge requiring the school board to pay for a tutor to be chosen by the youngster for a certain period of time?

MERROW: Because as soon as you get into output measures, you're in real trouble. If you say you must bring this kid up to an 8th grade reading level, or a fifth-grade reading level to satisfy the court. That might take years, who knows...

KRULWICH: Judges are a little afraid of that. There is a famous case in contract law, which one of these actions brought under the Contract Theory. Where a woman was contracted to sing in a music hall somewhere in England. Johanna Wagner was her name. An opera singer. She failed to snow, and the theater impresario sued Johanna and said Johanna should sing for me. He went into a court and said: "Judge, make her sing!" And the judge wrote an opinion which is in all the contract case books. He said:" Look, fellow, I'll give you money for the audience you didn't get: I'll give you some kind of damages and I'll assess them against Johanna Wagner, but if you ask me to make her sing...suppose she comes in and hums; now that isn't what you really would pay for and you'd be angry still. Suppose she came in and sang a song you didn't like

or wouldn't do your program. I would have to turn myself into an impresario, a voice coach, an expert in all kinds of things that I'm not an expert in. Rather than make an order to do something to your specifications, I'd rather do it in money terms. Because that's simple and neutral".

Now a judge in a case like this might have that feeling that maybe he should just make the student whole by giving them a sum of money and that will settle it and the judge won't have to keep his fingers in. That's probably why all these lawyers are suing for money damages. But it strikes me as common sense that they'd be better off suing for some kind of compensatory education, even if the judge, he might not like it, but even if he has to hang in.

MERROW: I would think judges would be very reluctant to get involved and to rule for the plaintif.

KRULWICH: They have been.

MERROW: If a court did decide that schools had to pay those it fails to educate, it would create havoc. Since most school systems are already hard-pressed for dollars. But otherwise, it's hard to generalize about schools and money because some are nearly bankrupt and others are, at least, relatively, well off. The courts, state and federal, have been asked to rule on the legality of the way schools raise money and we've asked Robert Krulwich to lead us through the maze.

KRULWICH: Most places in the United States have adopted Benjamin Franklin's innovation from colonial Philadelphia. They created a public elementary school system, directed by a local school board, and paid for, in good part by local taxes. Since the most lucrative local taxes, traditionally has been the tax on property, property values have had a lot to do with how much money is available for local schools.

So, for example in California, take two school districts. One in Beverly Hills, the home of movie stars, lawyers and accountants, where every acre of residential property commands a high price on the real-estate market; and another place farther north and east in Los Angeles, called Baldwin Park, home of poor whites and Chicanos, and the land there is worth a lot less. But both communities have a property tax which works something like this:

There's an assessor who estimates the market value of every property in the District, and each property owner is told what his acreage is worth at its present market value. The taxes then figure something like 75¢ on every $100 of value. So, if you live in a leaky tree-house, in a bad part of town, the assessor says your house has a market value of $100. Your tax is 75¢. Every additional $100 of value cost you another 75¢ in tax. If your property is one hundred times more valuable than the tree-house, your tax is one hundred times 75¢. Now, in a community like Beverly Hills, where many properties are worth hundreds of thousands of dollars, the 75¢ per $100 will produce a lot of income.

In poorer Baldwin Park, the same 75¢ rate applied to less valuable property produces less income. And because property taxes are a key source of money for schools, Baldwin Park simply can't afford the smaller classes, the experienced faculty, and the newer textbooks, that kids get in Beverly Hills.

And even if Baldwin Park parents voted to tax themselves at a much higher rate, and they did, their rate is about 40% higher than

Beverly Hills, the fact that their land had less value, and therefore, there was less to tax, created a permanent handicap. Without an exorbitant tax rate, the poorer district cannot generate as much school income as the rich one.

This situation is not unusual. Poor parents from Los Angeles, from Texas, from Connecticut, New Jersey, Maryland, Arizona, and Wyoming have gone to Court to ask that the local property financing of schools be declared unconstitutional. Because they say it makes the quality of public education dependent on the wealth of parents.

The parents who sued said the system violates a clause of the U.S. and many state constitutions, that promises every American equal protection of the laws. These laws, they say, favor the rich and do not protect poor children.

The courts have gone both ways on this issue. The United States Supreme Court said the local property tax in Texas was constitutionally acceptable and it was left more or less intact. But the top courts in California, in New Jersey, and in Connecticut declared their state school finance systems unconstitutional.

In all these cases, the judges were careful to stay away from the ticklish local issues that school boards traditionally decide. If the judges declare the system unconstitutional, they wrote opinions saying what was wrong, but they did not propose their own alternative financing plan. That they left to the State Legislatures.

In fact legislators, scholars, and judges have had a hard time trying to devise a scheme that gives each school district equal financial support. It's a tricky business. The obvious solution, giving every school the same amount of money per pupil fails to account for different maintenance costs between old and new schoolhouses, districts with strong teacher unions versus districts with no unions at all, and lower teacher salaries. Different cost for heating fuels, school lunches and custodial care across the States. Schools with high numbers of handicapped children, high numbers of discipline cases, or kids that need remedial language training.

Attorney Elliot Lichtman is involved in one of these cases now in New York State. He says judges want the hard political choices to be made by the Elected Legislators.

Lichtman: Legislators are generally given substantial periods of time to work-out the details, to come up with new plans. California, for example, if I recall correctly, legislature has been given three or four years to equilize the system. The courts bend over backwards to defer to legislatures. But there comes a point, and there has come a point, in some states, where the courts have had no choice. Where, to continue to withdraw and to defer to legislature results in the violation of the most basic constitutional rights.

And in those circumstances, the courts have no choice but to act.

KRULWICH: We had a case like that recently in New Jersey where the Supreme Court in Trenton gave the Legislature until last July to come up with a new school finance plan.

The legislature waffled for months, showed no sign of meeting the deadline until finally the justices said:"If the deadline passed, they would order the State Treasurer not to pay any more money to the public elementary schools." On deadline day, the justices shut the

schools down. Three days later, the legislature voted in a constitutionally acceptable plan.

There is yet to be a case where the judges run into a completely hostile legislature and is forced to subpoena fiscal experts, hire accountants, rent computer time and create a school finance plan right there in the courtroom. Few judges want to sit in that kind of a hot seat, but as Elliot Lichtman says,"If you're a judge and you rule the constitution requires a specific change, it is your duty to see that that change takes place. And if your Governor won't help you, and if the legislatures don't help, then you must do it yourself.As a judge sworn to uphold the Constitution, you really have no choice."

MERROW: That was NPR's Robert Krulwich, who's with us now in the studio, along NPR's Nina Totenberg. I guess I have the obvious question: Will the legislators act or will the state courts have to do the work? And the other places you didn't mention...

KRULWICH: I think that most legislatures will probably act. That seems to be the trend. There have been some legislatures, New Jersey is the principal case, where they just don't want to do that. First of all, it's very hard. Second of all, there's probably no more important issue to parents than the quality of their kids' education. And rich parents think, you know,"We're rich, we're in a nice district, and one of the reasons, one of the perqs of being rich is to give our kids a better education."

The notion of equality accross the board is not very popular. And the judges don't have that kind of political or emotional consensus behind them when they get into this area.

Rich people want better education and poor people are greedy for their kids.

So judges are going to find themselves more isolated on this issue than they would in any number of other issues they might get. But, when the judge tells a legislature this plan of taxing and raising money in this way is not allowed under our Constitution, so far, legislators have come across eventually with plans that judges have been willing to adopt. But we may have a time, I don't know when, there may come a time when the legislature just says no. And then you will see a judge doing what judges have had to do in the desegragation cases have had to do in Boston and in the South: simply taking over the finance administration problem in their courtroom. And as I said, no judge wants to do that. And no legislature really wants to turn that power over to an un-elected, appointed, or elected for a long term of years official. They don't want to. They don't want to give up the prerogative.

The energy that the parents will put on the legislators will probably keep the ball in the legislative court, I hope. As an administrative problem to define what equal support for a school is, it's hard to think of too many problems that are as complicated. Too many problems where the people involved feel absolutely fiercely about the way things ought to be.

* * * * * * *

MERROW: You're listening to OPTIONS IN EDUCATION's special examination of the Courts and the Public Schools. We've heard about the reluctance of elected officials to get involved in school finance.

Well, that's been the rule, not the exception, in school desegregation. We've asked Nina Totenberg to bring us up to date on school desegregation and the federal judges who made the politically unpopular decisions that the Constitution requires, but which legislatures, state courts and school boards shrank from making.

DESEGREGATION AND THE FIFTH CIRCUIT COURT

TOTENBERG: In 1954, the Supreme Court ruled unanimously that segregated schools are inherently unequal, and that segregation violates the constitutional guarantee to equal protection of the law.

The Court ordered all schools that were officially segregated to be desegregated with all deliberate speed. That meant all schools in the South had to be desegregated. But it was another thirteen years until the Supreme Court gave up its notion of all deliberate speed. In 1969, the Court put its foot on the neck of southern schools. And in the case of Alexander versus Homes County, the Court said "Desegregate now, do it now."

While all this was going on, Civil Rights advocates turned their attention to the North. Although most northern cities and towns had no laws that ever ordered black and white children to be educated separately, many school systems were virtually divided into black and white schools. Local governments contended that this was just the natural outgrowth of living patterns. But Civil Rights activists claimed that it was the result of intentional acts by local school boards, deliberate acts, such as the choice of locations for new school buildings, student and faculty assignments, and the way school attendance was zoned.

The Supreme Court first addressed the northern school problem just four years ago in a case from Denver, Colorado. The Court ruled that if there is no actual law requiring segregated schools, there must be proof that segregated schooling exists anyway. And that it was created not accidently, but deliberately by official actions of the school board and other agencies.

If such a showing can be made, as it was in the Denver case, then the Supreme Court said the school system must be desegregated. If a substantial portion of the system is segregated, the Court said, the whole system is infected and the whole system must be involved in the desegregation scheme. Not just particular targeted areas that were guilty of segregation.

In the Denver case, the system was desegregated to a large extent through busing. The Supreme Court has ruled in another case, from Charlotte, North Carolina, that the local federal judge has wide leeway in determining what remedial steps the school system must take to desegregate itself. And the Court has specifically put its O.K. on the remedy of busing, even massive busing.

But in the last two years, the Court, in cases from Dayton, Ohio, Indianapolis, and Austin, Texas, the Court has indicated a hesitancy about approving massive busing. Except, where there's been a finding of the most egregious kind of deliberate and massive segregation in the past.

The controversy over school desegregation has focused in the past five years on what kind of, and how radical, a remedy should be ordered in desegregating a school system.

Remedy was never much of an issue in the South, according to Frank Reed, Dean of the University of Tulsa Law School. Reed has just written a book detailing how the federal judiciary desegregated schools in the South. He says that school desegregation was actually easier in the South because blacks and whites lived in close proximity to each other. But northern towns typically have segregated housing patterns.

REED: Throughout the South, except for those large big cities, like Atlanta and Jacksonville, and Miami, New Orleans, where there are still terribly serious problems, except in the big cities, integration worked largely because the races were inter-mingled on living patterns. In the North, though, we have extremely segregated, and in the western barrios, there are extremely segregated living patterns. So simply drawing neutral zoning lines for schools doesn't solve the problem. So that means you've got to move the children somehow. And of course, the classic American standard way of moving children is through school busing. And that's why busing is so controversial in the North and not as controversial in the South.

TOTENBERG: A judge faced with desegregating a school system basically starts with the numbers. If he has 85% blacks in one school and 5% in another, he has to find a way to mix them. There are a number of things he can try, short of busing. Pairing in clustering schools, for example, so that let's say, you cluster two white schools and two black schools, and the first school then has charge of all grades one through three, the second school, grades three through six, and so on.

Another approach is the magnet school which, for example, might offer some particular course that no other school does. It might much better teacher-student-pupil ratios. I asked Dean Reed how judges deal with the question of white flight to the suburbs.

REED: It is the most difficult problem of all, of course. But I think any school district with under one-third black, that integrates, has a high chance of success, and that puts you all over the deep South, in small and medium-sized cities. Any district between one-third black and one-half black, most will be successful in integration although there will be some failures and there will be a lot of white flight. Anytime you tip over the half mark, and you have a majority of blacks in the system, there is massive white flight normally. I really think that those tipping percentages are in the back of a judge's mind. They know that intuitively. And they know that if they move too much towards massive busing or massive integration, and they get that tipping percentage close, they're going to have whites flee out of the system and it will just tip all black. And all their efforts are worthless.

TOTENBERG: But in the end, as one judge once said to me, "It's pretty clear what you have to do, you just have to get up your nerve to do it." The single group of judges who have made the most history and perhaps, suffered the most over desegregation, that single group

is the Fifth Circuit Court of Appeals. The Federal Appeals Court in charge of the Deep South. For twenty years after the landmark Brown vs. the Board of Education case in 1954, the Fifth Circuit was the eye of the hurricane. The men considered the giants of that Court John Minor Wisdom, Elbert Tuttle Richard Reeves, John R. Brown, those names roused singular passion throughout the South.

Yet they were not men whom one might have expected to desert their regional traditions. Again, Frank Reed.

REED: All of them were patricians in a sense, coming from the upper-income levels with very successful legal practice. They were content in the early years to wait until a case came to them, and to enforce the Supreme Court mandate because they had a constitutional duty to do so, but they were not all that enthusiastic. But even the slightest enforcement drew such incredible opposition, and such vilification, that over the years it was almost like going through caldron, they became hard steel in their determination to do what they considered their constitutional duty. And the cases which finally faced them to how serious the opposition was, was first the New Orleans case, where it took something like over forty judicial determinations to put four little black girls in the New Orleans school in the midst of riots. And then, after New Orleans, came the James Meredith matter, where two people were killed, there were 600 injured, the 82nd airborne division had to occupy Oxford, Mississippi, and it was there, I think, during the James Meredith matter, when they finally saw a total, ultimate intransigence of the State Governments of the Deep South. And they realized, in a sense, that they were out on a forefront, having to enforce these mandates by the Supreme Court with a very reluctant executive branch.

It took John Kennedy a long, long time to move those troops into Oxford. There were four attemps to enroll James Meredith, by the Court alone, with no help, before the Kennedy Administration finally put enough muscle in there to get it done. And so they were threatened, abused, they had to be guarded, their lives were in constant danger. There were attemps by James O. Eastland, who was then and is still the Chairman of the Senate Judiciary Committee, to investigate the Fifth Circuit judges, to find out if there was cause to impeach them. They were vilified in their home town, they just were under assault, and finally, when they finally at the last moment got the help from the Kennedy Administration, and James Meredith was enrolled, they began to see that it was only the most severe, strict scrutiny of every school board plan that would get integration accomplished. And they began experimenting with a host of remedies....

TOTENBERG: The judges soon learned that only the strictest kinds of remedies worked, that leaving a school system on its own at all to voluntarily desegregate, that simply didn't work. Any system that required black children to step forward and say they wanted to go to a predominantly white school, any system like that only resulted in the black children being vilified and intimidated. But times have changed, and for now, for the most part, white parents say at least, that they have no objection to their children going to school with blacks. But white parents are also saying that they

want their kids to go to the neighborhood school. That they bought their homes to be close to that school, and that they're not going to let some federal judge dicker around with their whole life set-up.

Again, Frank Reed:

REED: I understand that feeling, I do. But I think the Courts understand it too, when you see them moving away a little bit in their recent decisions for massive busing programs. But you've got to also realize that as long as, to some extent, poverty is identifiable racially, it means that the white population, by and large, is more mobile. can move to the suburbs, it can move to the better schools, to the better tax-base districts.

The blacks are stuck by reason of economy, in the large core center cities. That means, that unless there is some kind of forced integration, there will be no integration based on simple economics. If the whites have all moved to the suburbs and the blacks live in the poor city, it defies the courts to come with anything much more than some form of busing remedy. There is no other way to get the children to mix.

TOTENBERG: The Supreme Court has said, however, that federal judges may not order the children from one school district to be bused into another district, if only one district is guilty of segregation.

The ruling came in a Detroit case, where a federal judge had ordered children from the city bused into the suburbs. The Supreme Court said there was no evidence the suburbs had discriminated, so the busing order was invalidated. Detroit perfectly illustrates the problem. A city with an overwhelmingly black school population, simply cannot desegregate without going to the suburbs. There aren't enough white children to mix into the blend. And that smaller number of whites, if diluted throughout the school system, will only flee to the suburbs too.

So, desegregation, having worked really quite well in small and medium-sized towns and cities, may now have reached the point of unwork-ability.

MERROW: That report from Nina Totenberg who is with Robert Krulwich and me in the studio. It sounds to me, as if in both cases, school finance and desegregation, judges became involved because elected officials shirked their reponsibility.

TOTENBERG: In a contemporary sense, when you take the meanness out of school desegregation, and there's still plenty of it left, as we see in Boston and places like that, these questions illustrate a terribly sad problem that our society has because we have our most cherished values are really in conflict, our most cherished values of equality of opportunity, equality of education, everybody getting an even break. And also reward for good work, living in the neighborhood that you want to live in, where you've worked all your life to live in, having a life-style that you have some control over, that the government doesn't run your life, that the government is off your back, that this is a democracy where you run your life, not the government. And you really have those two values in absolute irrevocable conflict. It's terribly sad to watch us wrestling with it as a society and trying to come to grips with it, and the answers are never easy. They aren't really answers! That's the trouble, they're not really answers.

KRULWICH: Do you think, Nina that it is now getting harder for a judge in a desegregation case to make a bold judgment? Are conditions changing so that..

TOTENBERG: Well, I think it's harder for him, if in a strictly legal sense, because he's more likely to get reversed by the Supreme Court these days. Busing and desegregation is no longer the white knight it once was.

MERROW: You mentioned the likelihood of the Supreme Court overturning lower court decisions. Is the Supreme Court that much more conservative on the whole question of school desegregation?

TOTENBERG: Yes, I mean it has not reversed its trend totally, it's just much more. . . What the Supreme Court basically seems to be doing now, it still says that busing, that busing is a proper remedy, it still says that schools must be desegregated where there is proof of segregation. What it is now requiring, however, is a much greater showing of a large infection throughout the system to justify the large remedy the judges have been tailoring.

Those kinds of large remedies were not nearly so questioned by the Supreme Court, even five years ago.

KRULWICH: See, this is where it seems to me that the judge has to make the key decision, whether or not to declare a system unconstitutional. He's going to be less bold under this Court, he doesn't have his bosses backing him up clearly. The political consensus, I think, on desegregation is not nearly as strong nationally as it was ten, twelve, fifteen years ago. It is clear, once a judge says "Such and such is unconstitutional, it must change." Because he's a judge certain things have to happen. And he can, as the judge, see the natural consequence of his decision. He will be sitting in his office, running the school financially or running a busing program automatically in a matter of time. But the question is: Are the conditions in his head, or is environment that surrounds him conducive to boldness or not?

TOTENBERG: We do have a Supreme Court that, not just in the desegregation field but in other fields, is very definitely changing directions from the liberal Warren court. Where the situation with the law that much in flux, judges are just more cautious. Judges don't like to be reversed, it's not their favorite thing.

KRULWICH: Well, on the other hand, maybe they should be, because the country is no longer certain, as it was, about what is the right thing to do, and it seems to follow naturally that the judges shouldn't be as certain. Any judge who's sure as shootin' that he knows that busing is an A+ solution, or that such and such a school's financial plan is absolutely hundred percent right, is kidding himself in the environment we live in today.

* * * * * *

MERROW: Let's continue with OPTIONS IN EDUCATION's special examination of Schools and the Courts. With me are NPR's Nina Totenberg and Robert Krulwich.

The last two areas where the courts have gotten involved in school affairs are closely related: Free speech and discipline. Both issues raise a question of whether students have the same rights

as adults. That is, whether the Constitution applies to what goes on inside the schools.

"Speech" doesn't have to mean talking. And in fact, the most important Supreme Court decision about students and free speech, Tinker vs. Des Moines, concerns what's called "Symbolic Speech." Karen Shughrue of member station WAMU in Washington D.C., reports that despite the Tinker decision, schools and school boards are still censoring students.

THE FIRST AMENDMENT AND THE SCHOOLS

SHUGHRUE: What's considered the Landmark decision on students and the First Amendment came in 1969 with Tinker v. Des Moines, and it involved the first category of material that is most often censored: controversial political ideas.

A group of students in the Des Moines High School wore black arm-bands to protest the Vietnam War. The principal said the school was not the proper forum for such a protest and threatened to expel them. The Supreme Court said, "Schools do not possess absolute authority over their students, students in school as well as out of school are persons under the Constitution, they are possessed of fundamental rights which the State must respect. They may not be confined to those sentiments that are officially approved. Students are entitled to freedom of expression of their views." The Court also said that student rights can be curtailed in three situations.

Chris Fager is a Washington attorney with the Student Press Law Center, which collects and analyzes information on the First Amendment as it affects student journalists.

FAGER: There is simply no doubt that administrators have the power to control conduct in the schools. If a student gets out of line in a sense that a particular piece of writing is going to cause a disruption, and sometimes you see this in a racially inflammatory situation, in a recently desegregated school, then that's a situation in which an administrator is not powerless to act. The other thing, of course, is that they're not allowed to print anything that is libelous or anything that's obscene. School officials certainly can control when and where student literature is distributed. But short of that, the First Amendment simply does not allow administrators to restrict student writing or student expression because they don't like the idea.

SHUGHRUE: Fager argued a recent censorship case in front of the Court of Appeals in Richmond. On behalf of two students from Hayfield High School, in Fairfax, Virginia. As in so many other cases, the article in question concerned a second frequently censored topic: The life style and social problems of high school students.

The school principal with the school board's support prohibited the editors from printing an article entitled "Sexually Active Students Failed to Use Contraceptives." The article gave information on where to obtain birth control and on the affectiveness of various methods.

BOYD: I've always believed I had full authority. I edit the articles, I show them to our Sponsor, Mr. Hill, he might make suggestions,

but it's always up to me. He always says "You're the boss, you decide".

SHUGHRUE: Loren Boyd was the editor-in-chief of the "Farm News". She and Gina Gambino, her assistant, took the censorship issue to District Court and won. The School Board has appealed to the Fourth Circuit Court of Appeals.

A decision is expected in the next few months.

BOYD: Even when I was interviewing a girl, she even thanked me for writing an article on this, she said,"Oh, I'll really read it, I'm glad you're doing something like this." I think students need to be aware about birth control and I never thought, really, about how much trouble I would get into. I just didn't think about that.

SHUGHRUE: Rodney Page is Chairman of the Fairfax County School Board.

PAGE: It has been erroneously stated that this School Board prohibited the publication of a sex survey, that is not the case. It was only four paragraphs of that article, and it was the last four paragraphs that related to, and purported to convey, information with respect to birth control techniques. That information was directly contrary to a previously announced school board decision, which prohibits, at the present time, the teaching of birth control in the curriculum. This newspaper is prepared by a journalism class. The funds that are provided for the publication of the paper, and for the payment of a salary supplement for a faculty member to be sponsor are funds provided by the school board and that's tax money that is appropriated. It seems to me that those relationships establish that the Board has not turned over the paper totally to the students to do with as they please.

SHUGHRUE: District Court Judge Albert Bryan disagreed. He called Boyd's article innocuous and noted that birth control information was obtainable in the school library. The Judge rejected the school board's argument that it was an official school paper and, therefore, could be controlled. He ruled the "Farm News" was established in the school as a conduit for student expression and, in his words, falls clearly within the parameters of the First Amendment.

The constitutionality of guidelines for student papers or prior review by advisors has been tested in court as well. But the decisions are unclear. Some Circuit Courts say that's an unconstitutional prior restraint on the student's freedom of speech. Others say guidelines are legal if carefully and specifically drawn. But no court has ever attempted to draft a model. A third kind of article is often the target of censors - one that criticizes the school, questions its policy or gives it a poor image.

Papers have been censored for criticizing the dress code, the football team, and even for calling the censorship policy a bad one. Papers have been seized, shredded and burned. Students have been expelled or threatened with poor grades or recommendations.

In 1974, the Robert Kennedy Memorial Commission of Inquiry into High School Journalism issued its report entitled, "Captive Voices." Its conclusion: Censorship is accepted by teachers, administrators, even students in all parts of the country as a routine part of the school process.Censorship of the student press continues, even in states such as California, where laws have been passed prohibiting it, or as in New York, where court decisions have destroyed the legal foundation for it.

The Commission says administrators either ignore the decisions, or interpret them in their own favor. Rodney Page, Fairfax School Board Chairman, says that what the Board did in the Hayfield High School case was not censorship.

PAGE: That's really the issue. I think, we don't view it as censorship because we don't believe the First Amendment should apply to a case where the paper is part of our curriculum and we're dealing with the curriculum subject matter. That is the key difference between us and those of us who are litigating on behalf of the students.

SHUGHRUE: Chris Fager, with the Student Press Law Center.

FAGER: Clearly, of course, it was censorship. A student wanted to write an article and they said no. Now, that's censorship, they don't don't like the negative connotation, they feel that what they did was legal. We feel it was unconstitutional. What that school board did was set up a student newspaper and virtually give it to students to run, to control, to operate in any way they saw fit. And I think that's why we won in District Court because we were able to persuade the court that the students ought to be free to express themselves and you gave them a forum and you told them to express themselves, and just because you don't like it, you're not going to be able to choke it all.

MEPROW: That report from Karen Shughrue in Washington, for OPTIONS IN EDUCATION.

As we've heard, school administrators argue that they have the authority to decide what gets printed in a school newspaper, as part of their responsibility for seeing that school rules are obeyed. When they're not obeyed, suspension and expulsion are disciplinary tools that school administrators use.

But the courts have consistently ruled that students are entitled to "due process" like any other citizen. That is, students called up for disciplinary action should have an adequate hearing and legal counsel if the charges are serious.

Two years ago, the Supreme Court ruled in Wood v. Strickland that a school board may have to pay damages to students if it knowingly violated a student's rights to a fair hearing and legal counsel.

In Chicago, two high school students are asking for damages because of their suspensions. In the fall, the Supreme Court will hear the case. Scott Simon reports:

STUDENT RIGHTS

SIMON: The case that the Supreme Court will hear this fall is actually two separate instances, where lower courts ruled that the Chicago public schools violated the rights of two students in suspending them from school without a hearing or allowing them the right to legal counsel.

One of the students, a sixth-grader named, Silas Briscoe, was suspended for refusing to remove an earring. A high school student named Jaurvis Piphus was suspended from classes for twenty days after his principal discovered him smoking "something" on the steps of school.

The principal maintained that it was marijuana. Mr. Pifus said it was simply a cigarette, and the point of the case, according to his attorney, John Elson of the Northwestern University Legal Assistance Clinic, is that no hearing was held.

ELSON: The old notion that from the 19th century, that school masters can do whatever they want with respect to the school is now...no court will certainly adhere to that notion anymore. But rights of students to have a decent education, education with certain types of procedural fairness in their ability to receive it, is now the general rule in this country.

SIMON: What if Mr. Piphus had been called into the principal's office and the principal had said to him,"I saw you smoking marijuana on the steps of the school and you got to prove to me otherwise or else you're out." And Mr. Piphus had produced a Marlboro and said,"This is what I was smoking", and the principal said "That's not what it looked like to me" and Mr. Piphus had said,"Well, that's what it was," to which the principal replied,"Well, I'm older and I'm the principal and that's not what it was and you're out." Would that have been a "due process?"

ELSON: Well, it would have been for a hearing that's under ten days. Whether it would have been a "due process" for over ten days is questionable. Under Judge McClaren's ruling in the Piphus case, it would not have been because he required that the student be given an opportunity, not only formal notice of the charge against him written notice, but also an opportunity to present witnesses in his own behalf. An opportunity to be represented by counsel, an opportunity to make a record of the proceeding.

SIMON: The Briscoe case is a bit more unusual because in it the principal maintained that the earring worn by Silas Briscoe signified his membership in a gang. He replied that it was a symbol of black pride.

The predicament then opened according to John Elson, is how such a question of symbolism and ideology is resolved without resorting to competing affidavits from black scholars. In both instances, he feels the 1975 Supreme Court ruling of Wood vs. Strickland applies, which says that a school board is liable to damages when it knowingly allows a student's civil rights to be violated. And to avoid that, it is necessary to have hearings, appeals, and lawyers.

SIMON: The obvious response to a lot of this, I guess, would be from people who say that our society is already over-litigated, both formally in the courts, and informal hearing processes like workman's compensation and things like that.

To their mind this might simply add another layer, another spot where lawyers seem to be indispensable to the lives of ordinary mortals and it unnecessarily complicates life. Particularly in an educational institution where you presume there is an atmosphere of reason and free inquiry, and all that. How do you respond to that?

ELSON: Well, I think again, that's an unrealistic fear, partly because of the economics of the situation. There are not that many free lawyers around for poor people, legal aid resources are very limited and while they'll bring a few test cases to try to establish

the principle, they will not run into Court for every suspension. I mean, we can't possibily do that. And for people who must pay for attorneys, it's very expensive and it will be the very unusual parent who will be willing to shell out five hundred....a thousand dollars to vindicate the right to have the child stay and not be suspended for five or ten days.

SIMON: The Chicago School Board appealed these decisions, because it felt they constituted a diminution of a principal's individual authority and the right of the schools to administer their own internal rules.

We tried to interview several officials in the Chicago School Board, in the legal office and then in the Superintendent's office to pose their side of the issue, and each time were told that the Board would have no public statement until the case is heard. But it's the feeling of several Board principals that some more explicit federal decision on the rights of the students within schools and what they see is the whole idea of schools as public utilities, liable to damages when they suspend services, is needed, for them to function as effective administrators.

Attorney John Elson, who specializes in educational matters is hoping that the case will also clarify, at last, the rights of students.

ELSON: I've been somewhat dismayed at the lack of knowledge of high school students that I come in contact with of their rights. I think possibly, however, the most important effect of these type of decisions would be in warning the teachers that their students are individuals, are citizens with certain rights that have to be obeyed.

I've seen little evidence that this....that the fact that students have rights has changed their attitudes. I'd be very happy if it would.

MERROW: That report for OPTIONS IN EDUCATION from Scott Simon, in Chicago.

TOTENBERG: You know, John, I would suspect that there are a lot of these cases being brought, because the school discipline cases have come from the Supreme Court by very narrowly divided courts, five to four, with very bitter dissent. And I'm sure the feeling is that if just one person can be swung, we can change the drift of these decisions and not have to guarantee these children hearings at all.

Again, this year we had a five-to-four case which was a victory for a school board, involving spanking of students. And at five-to-four, the Court ruled that teachers under certain conditions can spank students.

MERROW: I was intrigued by the comment that students really don't know that much about what their rights are and that there aren't very many lawyers who will bring the cases, I suspect that...

KRULWICH: Do adults know what their rights are?

TOTENBERG: No, most adults don't know what their rights are. That's what the Miranda case telling people what their rights are when they're arrested for criminal offenses is all about. Most people don't know

what their rights are.

KRULWICH: The question is really could the administrators make the case publicly and loudly enough to the adults. "Look, we're supposed to run these schools and all of these things, hearings, letting the school publish these editorials which we really think cause all kinds of administrative problems for us, we really think we should be the bosses, we know our schools better than any of you."

MERROW: That's the traditional view, and I suspect that's the view most parents, judging from Gallup Polls on how...on issues, parents consistently say that discipline is the major problem in school.

TOTENBERG: Well yeah, but that's one thing to say about the major problems in school until it's your kid. And then, the worm turns, and it's also sort of an interesting thing to me, and I bear this out, and if I'm wrong, Justice White, you'll just have to correct me.

The leading Supreme Court Justice in the field of school discipline, on the side of the youngsters, is Justice Byron White, who, on most other things involving discipline of any sort, is on the other side.

And I have to only conclude that either he or one of his kids ran afoul of a school system at one time in his life, and I think that's what happened.

KRULWICH: Well, but I know a lot of parents who have kids in school and say "beat...beat the bum," and would line themselves up with the administrators and the faculty.

MERROW: It's very clear that schools are one of the last bastions of authoritarian behavior in a society that tells kids that they have a lot of other choices.

KRULWICH: But again, I think, the reasons you have the cases drifting this way in this area, and judges much more gingerly in the areas of finance and desegregation, is because the judges can make the decisions and it stays out of the courthouse, pretty much, they don't have to administer it.

MERROW: The court now has a former school board president.

KRULWICH: Who is this man?

TOTENBERG: Lewis Powell.

MERROW: He used to be president of the school board in Richmond, Virginia. How much do you suppose he influences the other people?

TOTENBERG: Well, apparently, not all that much, at least in the discipline area because he wrote a wild-eyed dissent in the school discipline case for the 4-man minority. He wrote majority case okaying school spanking and he wrote the court's decision saying that school financing did not have to be equally proportioned throughout the States. So, when he carries the day, and all those decisions have been five-four, he carries the day.

MERROW: We've talked about a number of issues - school finance, desegregation, discipline, free speech and the whole issue of educational malpractice, I wonder if either of you, or both of you, want to risk generalizing. Are they going any certain way?

KRULWICH: I don't think so, I think these things are complicated cases and the judges who have to make the decisions are probably very complicated people, and it's a mixture of what they feel and what they've learned. The only institutional instinct that a judge may have is that once he gets the strength, and we've said this once before, once he gets the strength to make a constitutional decision, wherever that strength may come from, whether its weakening or getting strong, once he makes it, he's committed to certain action and he'll have to follow it through. You may find judges taking over school systems to desegregate them still. You may find judges taking over school systems to arrange for their finances still, because they owe it to their oath of fealty to the Constitution.

In other areas, I think I pick up Nina's suggestion. Areas of school discipline and censorship, they may be reacting to their experiences in their house, to what their kids have done, and they may be making decisions with that slight law school bias that any human being would make.

MERROW: I talked to one activist, a guy who has brought a number of suits and he told me that given this Supreme Court, it's probably best to try to work things out at the local level, to keep the Supreme Court out of it. He went on to say that the existing decisions are pretty good, that the rights are there for students, the problem is to let them know about it. The problem might be to enlist more lawyers to work at that level, but essentially the problem is getting the word out, letting students know that they do have these rights, that they have a right to free speech, that they have certain rights of "due process," for example, in discipline cases.

KRULWICH: But as Nina says, the people who have been losing these cases now think they might be able to get them a majority, they're going to keep bringing them.

TOTENBERG: That's right. I'd say that guy is full of fiddle-faddle. It doesn't matter, if a school board doesn't want to grant those rights, it's not going to and say "We'll appeal it because we have a better chance now of winning, what have we got to lose?" And they do have a better chance now of winning.

MERROW: So you're suggesting that schools are not only not being dragged into the 20th century, but they've actually turned things around, and they can move back in the other direction.

TOTENBERG: Well, there's also great pressure for them to move back in the other direction, we see this in the whole area of going back to the three "R's," of abandonning the new math, of closing up the open classrooms. There's been a tremendous counter-revolution to what we saw in the sixties in education, and I think this is part of it.

MERROW: And courts are very much a part of that counter-revolution.

TOTENBERG: I think they can be.

KRULWICH: Yeah, well whether it's moving forward or backward in time is the heavily-laden value judgment. I mean there may be that there's a majority of people, students and teachers and parents alike that think that more discipline, more censorship, and more slapping around is what everyone needs.

TOTENBERG: Well, you heard the Scott Simon piece we just heard. That case is not really terrioly different from some of the other cases that come to the Court. It's only being brought because the Chicago School Board doesn't want to do it the way the Court said in the past and they're hoping that the court will now change its mind about the way they have to do it

MERROW: Do you care to make a prediction?

TOTENBERG: No.

KRULWICH: I don't know about desegregation and school finance. There will be probably very little litigation to the United States Supreme Court, but state supreme courts have been very busy and will continue to be very busy, and there will be more cases brought.

The newest one that I've heard about is in New York State, where a group of towns in Long Island have been joined by New York City, Buffalo and Syracuse and they're alleging a whole array of wrongs, but the newest one is that State public financing discriminates against big cities in favor of rural. So now we leave behind rich parents and poor parents, and move on to crowded places - empty places.

TOTENBERG: One last thing that's sort of interesting, the most interesting, just to make this subject even more complicated than we've already made it, is that I refuse to make a prediction on Scott Simon's discipline case because the court's vote has always been five-four in these cases and it's just too hairy a shot to call. But add into that equation the fact that the composition of the Supreme Court is very likely to change in the next few years because it's an old Supreme Court and Jimmy Carter will get some nominations. What kind of nominations? What sort of people he'll nominate? He's a very complicated President and he's not as liberal as some people thought, and not as conservative as some people thought, and what will his appointments turn out to be? And how will they affect the future of school finance, desegregation, school discipline, school malpractice suits...who knows?

MERROW: Our thanks to Nina Totenberg, NPR's legal affairs correspondent, and Robert Krulwich, news editor here at National Public Radio.

Other material for this program came from Karen Shuchrue, WAMU, Washington, D.C.; Cathy Lewis in New York, and Scott Simon in Chicago.

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MERROW: If you'd like a transcript of this program "THE COURTS AND THE PUBLIC SCHOOLS", send 50¢ to National Public Radio - Education, Washington, D.C. 20036. A cassette is also available for $5. Ask for program #85, and please tell us the call letters of your NPR station.

OPTIONS IN EDUCATION is a co-production of National Public Radio and the Institute for Educational Leadership of The George Washington University.

Principal support is provided by the National Insititute of Education. Additional funds are provided by Carnegie Corporation of New York and the Corporation for Public Broadcasting.

OPTIONS IN EDUCATION is written and produced by Jo Ellyn Rackleff and John Merrow. The Assistant Producer is Katharine Ferguson. Technical Assistance by Skip Pizzi.

I'm John Merrow and this is NPR, National Public Radio.

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